follows: "In all the cases to which we have referred, it will be observed that the possession relied on was the actual occupation of the land; and that the equity sought to be enforced was on behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on."

It seems, therefore, to us that the point has already been concluded by authority of the Privy Council. The purchaser was bound, as their Lordships say, with notice of the tenancy, and was liable to any equity which the tenant in occupation could raise against him; but he was not bound by notice of the lessor's title, and he has no equity whatsoever.

The result is that this appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Trevelyan.

HEILGERS & Co. (PLAINTIFFS) *v.* JADUB LALL SHAW AND ANOTHER (DEFENDANTS.)*

1889 *March* 5.

Contract, Construction of—Cash on delivery—Readiness and willingness to take delivery—Delivery, Failure of, in terms of contract—Breach of contract—Custom.

Where a contract is for delivery "free on board," and cash on delivery is provided for, payment may be required upon delivery of the goods at the time and place mentioned for delivery in the contract.

THIS was a suit, brought by Messrs. Heilgers & Co., to recover Rs. 2,000 as damages from the defendants, who were jute balers, for failure to deliver certain bales of jute in accordance with a contract.

The contract bore date the 25th June 1887, and under it the plaintiffs bought from the defendants two thousand bales of jute at Rs. 12-8 per bale, the terms and conditions being cash on delivery; one thousand bales to be shipped in October, and one

* Small Cause Court Reference No. 6 of 1888, made by H. Millett, Esq., Chief Judge of the Small Cause Court of Calcutta.

1889

HEILGERS & Co. v. JADUB LALL SHAW.

thousand bales between the 1st and 28th November 1887, in lots of 250 at a time.

The suit bore reference only to the thousand bales to be shipped between the 1st and 28th November.

On the 23rd November, the plaintiffs wrote to the defendants, requesting them to place alongside the *G. R. Skolfield*, on the 25th and 26th, two hundred and fifty bales each day, and alongside the *Belle of Bath* two hundred and fifty bales each day, on 26th and 28th November. On the 24th November, the defendants wrote to the plaintiffs, stating that they were unable to deliver on the exact dates referred to, but would deliver the one thousand bales alongside by the 28th November, commencing export from the 26th November.

Early on the morning of the 27th, the defendants sent alongside the *Belle of Bath* five boats' load of jute, but were unable to deliver the same on board owing to the 27th being a Sunday. On the 28th they sent alongside the *G. R. Skolfield* four boats laden with jute; thus completing the delivery alongside of the 1,000 bales.

The defendants, on the 28th November, wrote to the plaintiffs informing them that the bales were alongside as requested, and called upon them to pay for the bales as, and when, delivery was given on board. The plaintiffs received this letter at a quarter to four on the evening of the 28th November, and at once sent off two persons with Rs. 5,000 each to the two ships; these persons arrived alongside at a quarter past four, at which hour both ships had ceased work for the day, and they shortly after returned to the plaintiffs, having been unable to take delivery.

The plaintiffs requested the defendants to bring the boats alongside on the 29th, but they replied that they had tendered the bales on the 28th in accordance with the contract of the 25th June, and that the plaintiffs not having taken delivery and paid for the bales, the contract was considered by them to be cancelled.

The plaintiffs thereupon brought the present suit to recover damages. The defendants admitted the contract, but pleaded that the plaintiffs were not ready and willing to perform their part of the contract.

1889

HEILGERS & Co. v. JADUB LALL SHAW.

The evidence produced showed that the defendants had, on the 15th October 1887, complained to the plaintiffs of delay in payment of their bills under other contracts; and had also on the 26th October informed them that cash on delivery was essential under the present contract, and regretted that the plaintiffs had not hitherto complied with these terms; and on the 25th November again wrote to the plaintiffs, complaining of their delay in making payments under the present contract. The plaintiffs called two or three witnesses, who stated that "Cash on delivery by force of custom" meant "Cash on delivery of the mate's receipts," but no specific instances of such custom were given; and, on the other hand, one of such witnesses stated that he had—since the decision of *Vale King* v. *Jadub Lall Shaw and others*, the present defendants (a case decided on the 12th August 1887 by the Chief Judge in which the defendants had insisted on payments on delivery of the bales with a contract similar to the present, and Vale King & Co. had endeavoured to prove a practice of paying on production of the mate's receipts, and in which the Court held that cash on delivery of each bale was rightly insisted on), for safety's sake—inserted in all future contracts "Cash on production of mate's receipts."

The Chief Judge, in the present case, held that the evidence above referred to was not sufficient to establish a local custom, subverting the plain and well-understood meaning of the words "cash on delivery," which could only mean cash as the goods were delivered; he further found that the plaintiffs had failed to prove that they were ready and willing to perform their side of the contract, as the evidence given showed that had the ships been capable of working at 4-15 on the 28th November, no more than 150 bales could have been received by each boat that evening. He, therefore, dismissed the suit, but at the request of the plaintiffs Counsel referred the following questions to the High Court:—

(1.) When and where was payment to be made by the buyers under the contract?

(2.) What is the meaning and effect of the expressions "Cash on delivery," "Free on board," in the said contract with respect to the mode of payment thereunder?

(3.) Were the buyers bound under the contract to make payment on board ship?

1889

HEILGERS & Co. v. JADUB LALL SHAW.

(4.) Having regard to the course of business followed in contracts of this nature, was payment under the present contract to be made at the office of the buyers against the mate's receipts?

(5.) Did the plaintiffs in any case show sufficient readiness and willingness to perform their part of the contract by their tender made on the 28th November 1887?

At the hearing of the reference,—

Mr. *Acworth*, for the plaintiffs, contended that the meaning of "cash on delivery" was cash in exchange upon mate's receipts at the office; that the words "on" or "upon" have been construed to mean "before" "at time of" or "after," and cited *Cowasjee* v. *Thompson* (1) where the goods had been paid for. [WILSON, J.—That case was one of stoppage *in transitu*, and does not throw any light on this case.] See Benjamin on Sales, p. 838. He also cited *Queen* v. *Humphery* (2), to show that to construe the words strictly would reduce business to a standstill; and referred to *Bourne* v. *Gatliff* (3) as to previous course of business between the parties, and *Humphrey* v. *Dale* (4), to show when oral evidence fixing a liability not provided for by the contract can be used.

Mr. *Bonnerjee* and Mr. *Sale* for the defendants were not called upon.

The opinion of the Court (WILSON and TREVELYAN, JJ.) was delivered by

WILSON, J.—We do not think there is any necessity for us to call on the defendants in this case.

The point is a very small one. The contract out of which the suit arises was a contract for delivery of certain bales of jute, so many in October and so many within certain days of November. The contract was a written one, and contains only a few words having any bearing on the question in dispute. The amounts and price are set out. The goods are to be delivered free on board, and the sellers undertake to deliver as soon as possible. Then under the heading, "Terms and conditions," come the words "Cash on delivery." Then it is provided that 1,000 bales are to

(1) 5 Mad. H. C., 165.
(2) 10 Ad. & El., 335.
(3) 11 Cl. & F., 45 (49).
(4) 7 El. and Bl., 226.

be shipped during October, and 1,000 bales between the 1st and 28th November, in lots of 250 at a time. The real point now is, what is the meaning of "Cash on delivery?" What happened was this: Some days before the 28th November, I think on the 23rd, plaintiffs wrote to the vendors (defendants) and said they desired a certain quantity of bales delivered on the 25th and 26th November, so much on one ship, so much on another. The defendants replied that they could not exactly comply with the plaintiffs' desire as to time of delivery, but they would deliver the whole quantity by the 28th, which would be within time according to the contract. As a fact, it turned out that the vendors had their lighters alongside the ships on Sunday and Monday, the 27th and 28th, and were ready and willing to give delivery, if paid then and there for the jute.

On Monday the 28th, rather late in the day, a communication was made to the purchasers on the subject, and then when it was too late for delivery to be given on that day of the whole of the bales, they sent some one on board the ships with cash to pay for the bales as they were delivered. The consequence of this delay was that the bales were not delivered. The plaintiffs cannot say they were taken by surprise, as there had been correspondence between the parties in which the vendors said they would insist strictly on their rights under the contract, and it was known what they meant by that, as similar points had been the subject of litigation in a case in which the present defendants were concerned; and that the plaintiffs did not think they could safely assert any other view of the contract is plain from what they did on the 28th when they sent cash on board the ships. Under these circumstances, the plaintiffs have brought this suit against the defendants for non-delivery of the jute. The defence is that the vendors were ready and willing to deliver the jute if the plaintiffs had been ready to pay for it as it was delivered. The only question, then, as I said before, is what is the meaning of the words "Cash on delivery." The defendants say the words mean, cash as the bales are delivered over the ship's side.

The plaintiffs say they mean, cash in exchange for mate's receipts to be brought to their office. These words are of common occurrence not only in this country, but all over the world; and it would be a most dangerous thing if we were to introduce

1889

HEILGERS & Co. v. JADUB LALL SHAW.

any doubt as to their meaning. Cash on delivery means cash in exchange for and simultaneous with delivery of the goods. If doubt were allowed as to the meaning of these words, it might also be raised as to the meaning of other just as common words, such as payment against shipping documents.

No doubt such a contract, if rigidly enforced, may in many cases prove very troublesome to the parties, and, consequently, we find from the evidence that some mercantile men avoid such a form of contract. Sometimes the purchaser waives a little of his rights and pays for the goods a little before delivery. Sometimes the vendor waives a little of his rights and takes payment on presentation of the mate's receipts. But that does not alter the plain meaning of the words.

Then it is said that there is evidence of custom which alters the meaning of the words. In the first place, I think it may well be questioned whether evidence could be given to contradict the plain meaning of these words of a written contract; but whether that be so or not, there is nothing in this case amounting to evidence of custom to show that a different meaning should be put on the words from the natural one. The evidence goes no further than to say that the difficulty in most cases is got over by one party giving way a little. The result is that we think the learned Judge's decision is correct.

The first three questions referred to us are :—

[His Lordship read the first three questions, see *ante* p. 419, and continued.]

These three questions it is convenient for us to answer together by saying that, where a contract is for delivery "free on board," and "cash on delivery" is provided for, payment may be required upon delivery of the goods at the time and place mentioned in the contract for delivery.

The other two questions we answer in the negative.

Messrs. *Sanderson & Co.*, attorneys for the plaintiffs.

Mr. *H. C. Chick*, attorney for the defendants.

T. A. P.